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IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

No. 318

PEORIA AND PEKIN UNION RAILWAY COMPANY, *Appellant*,

vs.

THE UNITED STATES OF AMERICA, ET AL, *Appellees*

BRIEF FOR APPELLANT

JOHN M. ELLIOTT,
ROBERT V. FLETCHER,
Attorneys for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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I. STATEMENT OF THE CASE.

This case comes to this Court on the appeal of the Peoria and Pekin Union Railway Co. from a decree of the United States District Court for the Southern District of Illinois denying appellant's motion for a temporary injunction. The Bill filed by appellant challenged the validity of a certain emergency service order made by the Interstate Commerce Commission, known in this record as Service Order No. 37, by the terms of which appellant, Peoria and Pekin Union Railway Co., was required to switch cars in interchange between the Minneapolis and St. Louis Railroad

Co. (hereinafter for brevity designated as the M. & St. L.), and connecting carriers at and in the vicinity of Peoria, Ill. The suit was brought by the Peoria and Pekin Union Railway Co. against the United States of America under the provisions of the Urgent Deficiency Appropriations Act of October 22, 1913, 38 Stat. L., 219.

The Bill alleges in substance that the Peoria and Pekin Railway Co., is a railroad corporation organized and existing under the General Railroad Act of the State of Illinois, and that by the terms of its charter it has the right to operate, and does operate a railroad extending from Peoria, Peoria County, Ill., to Pekin, Tazewell County, Ill. The Bill shows that while appellant is engaged in a general railroad business, its principal work is in connection with switching and terminal service. It is shown that the Peoria and Pekin Union Railway at various times entered into contracts with some eight railroads operating in the vicinity of Peoria, by the terms of which contracts, all being of the same general tenor, the Peoria and Pekin Union Railway agreed to perform the necessary switching, whereby freight traffic and freight cars might be interchanged among the several railroads. One of these contracts, which is typical of all the others, was made an exhibit to the Bill, (R. 15). One of the railroads thus entering into contract with the appellant was the Iowa Central, the predecessor in title and interest of the M. & St. L. By the terms of this contract, the M. & St. L. agreed to pay to the Peoria and Pekin Railway Co., appellant here, a certain sum per car for the service performed by appellant in transferring freight traffic and freight cars to and from the M. & St. L. from and to connecting railroads in the vicinity of

Peoria. All the railroads operating in the Peoria territory formerly had contracts of this tenor with appellant, except the Chicago, Burlington and Quincy Railroad Co., and the Chicago, Rock Island and Pacific Railroad Co. By reason of these contracts, prior to April 1, 1921, all the railroads operating into Peoria (except the Rock Island and Burlington, as stated) each bore one-half of the cost of transferring freight from each railroad to every other. With certain unimportant exceptions, none of the railroads serving the Peoria territory had direct physical connection one with the other, and as a result, it was necessary for these railroads to engage the services of the Peoria and Pekin Union Railway Co., whereby the transfer of freight could be made from one trunk line to another.

The Bill avers that for about 35 years prior to April 1, 1921, the M. & St. L. and its predecessor in title, by virtue of the contract entered into between that Company and appellant, employed appellant to make transfer of freight and freight cars to connecting lines just as did all other railroads operating in and about Peoria, (except as stated the Chicago, Burlington and Quincy, and the Chicago, Rock Island and Pacific). By reason of this contract and the employment of appellant in the capacity stated, the M. & St. L. had fairly borne its due proportion of the expense of making transfers of freight and freight cars, it being an established railroad practice that such expense should be borne in equal portions by the railroads participating in the transfer. During all this time the M. & St. L. recognized its obligation to pay its fair proportion of this transfer expense, since the rails of the M. & St. L. did not connect directly with the rails of other lines. It is stated in the Bill that the expense of mak-

ing transfers of this character is under established railroad practice borne by the interchanging lines in one of two ways. In some cases each of the interchanging lines bears one-half of the expense of the transfer in both directions, and in other cases the delivering line bears the entire expense of transferring the cars to its connection. Assuming that the interchange of traffic is evenly balanced in both directions, these two methods impose substantially the same expense upon each of the interchanging lines.

The Bill recites that the line of the M. & St. L. touches the City of Peoria only in the extreme southwestern corner thereof, its rails terminating at a point known as Iowa Junction, near which it maintains a yard known as the Bartlett Yard. The end of its rails is separated from the rails of connecting lines (other than the Rock Island) by distances that vary from one-half mile in the case of the Chicago and Northwestern Railway, to some 12 miles, in the case of the Illinois Central, Cleveland, Cincinnati, Chicago and St. Louis, and Chicago, Peoria and St. Louis, the rails of all of which end at Pekin, Ill. Under the terms of the several contracts, all of which were similar, each railroad was granted the right and privilege of moving its freight trains over the tracks of the appellant from the point of contact between the rails of the trunk lines and the rails of appellant to a convenient intermediate point of interchange designated by appellant, which point of interchange at the time this controversy arose, and for some years theretofore, was a yard owned and maintained by appellant known as the East Peoria Yard.

The work of breaking up the incoming trains at this East Peoria Yard and making up outgoing trains for the various tenant companies, thereby effecting a

transfer from one railroad to the other, was done under the terms of the contract by appellant. For the use of these tracks, and for the service of appellant in effecting this transfer, each of the railroad companies paid a certain charge to appellant, this charge varying from time to time, in accordance with fluctuations in the cost of performing the service. As an illustration, assuming that a freight train came into Peoria over the rails of the M. & St. L., composed of cars which were to be transferred to various other railroads for outbound movement from Peoria, the Minneapolis and St. Louis would with its own engine haul this train over the tracks of the Peoria and Pekin Union Railway from Bartlett Yard, a distance of about three miles, to the East Peoria Yard. There the engine of the M. & St. L. would be detached from the train, and a switch engine of the Peoria and Pekin Union would take charge of the train, switch the cars upon convenient tracks, where these cars would be put into outbound trains of other railroad companies for outbound transportation from Peoria. When each train was made up for such outbound carriers, the engines of these outbound carriers would be attached to the trains and the trains would move out from the East Peoria Yard over the rails of the Peoria and Pekin Union to the point where such rails connected with the rails of the outbound carrier. By virtue of this arrangement, each railroad paid its proper portion of the expense of making the transfer.

On or about December 31, 1920, the M. & St. L. served notice upon the appellant, Peoria and Pekin Union Railway Co., that effective April 1, 1921, the M. & St. L. would no longer be bound by the terms of the contract theretofore existing. By the terms of the con-

tract, any company had the right to terminate the same upon notice, and no question is made as to the right of the M. & St. L. thus to terminate its contract relations with the appellant. The controversy between appellant and the M. & St. L. arises from the fact that after April 1, 1921, the M. & St. L. refused to pay anything to appellant for the service performed by appellant in transferring the cars between the M. & St. L. and other railroad companies at Peoria.

Beginning April 1, 1921, when the M. & St. L. had a car for one of its connections at Peoria, it placed this car upon an interchange track near Iowa Junction, thereby delivering the car to appellant. The M. & St. L. insisted that the delivery of a car to appellant was a delivery to each of appellant's tenants, and that its obligation was discharged when it had placed this car upon an interchange track near the point of contact between the rails of the M. & St. L. and the rails of appellant. Upon the same theory, it insisted that appellant was under obligations to deliver to the Minneapolis and St. Louis on the track of the M. & St. L. all of the cars coming from connections moving outbound from Peoria over the rails of the M. & St. L. In other words, the M. & St. L. took the position that the rails of the Peoria and Pekin Union were simply an extension of the rails of the tenant lines, and that the Peoria and Pekin Union was the mere agent of all the tenant lines. For this reason, the M. & St. L. declined to bear any part of the expense of making the transfer.

Following the announced determination of the M. & St. L. not to pay any part of the transfer expense, appellant served notice upon that line that appellant would thereafter decline to perform this transfer service unless some arrangement was made by contract or

otherwise, whereby the M. & St. L. would bear its proper proportion of the transfer expense. Following this notice, the M. & St. L. filed its Bill in the United States District Court for the Southern District of Illinois, against the appellant, and a number of its tenant lines, wherein an injunction was sought mandatory in character, requiring appellant to continue to perform the transfer service without compensation to be paid by the M. & St. L. Appellant moved to dissolve this injunction, and upon hearing, the Court entered an order in the following words:

> "Ordered and adjudged that the motion of the Complainant for a temporary injunction be and the same is denied, and the said Bill be and the same is hereby dismissed for want of jurisdiction and equity, to all of which Plaintiff by counsel excepts." (R. 7.)

In the meantime, after the filing of this Bill by the M. & St. L., and before the hearing was had, appellant after a conference with the then Chairman of the Interstate Commerce Commission, filed a Tariff, known as No. 36, under the terms of which it was provided that a charge of $4 per car should be imposed for each car handled for the M. & St. L. in interchange service between Iowa Junction, where the rails of the M. & St. L. connect with the rails of appellant, and the East Peoria Yard, the established point of interchange used by appellant in making transfer of cars to and from all lines of railroad for which appellant performs a transfor service in the Peoria territory. This tariff was made effective on one day's notice, under special permission granted by the Interstate Commerce Commission, the effective date of the tariff being August 30,

1921. From and after the effective date of this tariff, and from and after the rendition of the decree in the said cause brought by the M. & St. L. against appellant and other railroads, the M. & St. L. paid to appellant until January 8, 1923, the sum of $4 per car for effecting the transfer between the M. & St. L. and its connections at Peoria.

Shortly after the Bill of the M. & St. L. was dismissed by the United States District Court for the Southern District of Illinois, and shortly after the taking effect of the Tariff No. 36, the M. & St. L. filed a complaint before the Interstate Commerce Commission against appellant under the Docket No. 13110, by which complaint, the M. & St. L. sought to have this Tariff No. 36 cancelled and set aside as being illegal, unreasonable and discriminatory. Answer was filed on behalf of the appellant, testimony was taken, and the case was in due course submitted to the Interstate Commerce Commission. On April 13, 1922, the said Commission rendered its report and order in this case, (*68 I. C. C. 412*) (R. 33), in which the Commission decided that appellant had the right to file a tariff imposing a charge to be paid by the M. & St. L. for this transfer service. However, the Commission concluded, and so stated in its report, that the charge could not be made against the M. & St. L. unless a similar charge was made against the Chicago, Rock Island and Pacific, and Chicago, Burlington and Quincy, roads which the Commission found to be in the same situation as the M. &. St. L. The Commission expressed itself as not entirely satisfied with the measure of the charge, and entered its order requiring the charge to be cancelled, but permitting the appellant to remove the declared discrimination by filing similar charges against other

railroads at Peoria, particularly the Rock Island and the Burlington. The Bill alleges that after the rendition of this report and order, appellant filed another tariff, being Tariff No. 40, imposing charges upon the Chicago, Rock Island and Pacific, the Chicago, Burlington & Quincy, and the Peoria Railway Terminal (the latter Company being a small switching line in Peoria), by means of which tariff, appellant proposed to remove the discrimination which had been found by the Commission. Upon the protest of the railroads affected by Tariff No. 40, the Interstate Commerce Commission suspended this tariff and at the same time, upon the petition of the M. & St. L., reopened cause No. 13110. In accordance with the action of the Commission in suspending this tariff, another hearing was had before the Commission, at which testimony was offered, and thereafter the consolidated cases were re-argued and submitted to the Commission. On December 22, 1922, the Interstate Commerce Commission rendered an opinion and order in this consolidated case (*77 I. C. C. Rep. 43*) (R. 40), by the terms of which, Tariff No. 40 was required to be cancelled as being discriminatory, and the Commission announced that the situation was such that it would be necessary for it to order a general investigation into the situation, to which all parties to that case, and also all tenants of the appellant should be made parties, wherein the Commission would determine for itself what should be the reasonable and non-prejudicial rates and charges to be paid by all the interested parties at Peoria. However, the Tariff No. 36, imposing a charge upon the M. & St. L. was not in any way affected by this order, and this tariff remained in full force and effect.

The order of the Commission (R. 48) dismissed fin-

ally the complaint of the M. & St. L., No. 13110, leaving as stated, Tariff No. 36 in full force and effect. The Bill shows further that sometime after the rendition of this second opinion of the Commission, to wit, on or about January 2, 1923, the M. & St. L. served notice upon appellant that it would no longer continue to pay the tariff charge of $4 per car for making the transfer of cars to and from the M. & St. L. from and to its connections at Peoria, nor would it pay any other sum for such service, and that from and after the date of the notice it would expect the appellant to perform this service without charge to the M. & St. L. When this notice was received by the appellant, it notified the M. & St. L. that in view of the existence of the tariff, as well as the obvious duty of the M. & St. L. to pay its part of the transfer charge, appellant would not perform the transfer service without compensation, and that from and after the date named by appellant, appellant would refuse to receive any cars from the M. & St. L., or deliver any cars to the M. & St. L., unless the tariff charge was paid to appellant in advance of the performance of the service. The Bill shows that the attention of the Interstate Commerce Commission was drawn to this controversy, and that the appellant's President received, on January 5, 1923, a telegram from one of the members of the Interstate Commerce Commission asking plaintiff not to take any action which would result in the interruption of traffic. As a result of this telegram, appellant continued for a time to perform the service for the M. & St. L., until conferences were had between members of the Interstate Commerce Commission on the one hand and representatives of appellant, on the other. These conferences were ineffectual to bring about any agree-

ment or understanding between appellant and the M. & St. L., so that appellant served a final notice upon the M. & St. L. to the effect that from and after 12 o'clock noon on January 20, 1923, appellant would refuse to handle any traffic in interchange for the M. & St. L., unless its transfer charges were paid therefor.

The Bill shows that after the receipt of this notice, and before its effective date, namely on January 18, 1923, one of the divisions of the Interstate Commerce Commission, to wit, Division 5, made and entered its certain service order 37, to cancel and set aside which order this proceeding was instituted. This service order is Exhibit 1 to the Bill, and is found on pages 13 and 14 of the Record. Following certain recitals therein contained, the order provides (R. 14):

> "That the Peoria & Pekin Union Railway Co. shall with reasonable promptness and diligence continue to interchange freight traffic between the Minneapolis & St. Louis Railroad Company and connecting carriers at the regularly established interchange points at and in the vicinity of Peoria, Ill."

Thereupon appellant filed this Bill setting out the facts above briefly stated, and alleging that the service order was null and void for the reason that neither the Interstate Commerce Commission nor any division thereof had authority under the law to make an order of this kind. It is alleged in the Bill that the order is a so-called emergency order issued by the Interstate Commerce Commission under pretended authority granted by the Interstate Commerce Act, but that it is in excess of the power of the Interstate Commerce Commission, and is consequently of

no validity. It is charged, also, that the order of the Interstate Commerce Commission requiring appellant to perform this service without compensation, amounts to a taking of property of appellant without due process of law, and also a taking of private property for public use without just compensation, contrary to the Fifth Amendment to the Constitution of the United States. Upon the filing of this Bill in the United States District Court, the judge of the Court called in two other judges, one of whom was a circuit judge, as the Statute requires. Interventions were made by the Interstate Commerce Commission (R. 73), and by the M. & St. L., as being a party in interest. The United States filed its answer (R. 50) setting up the fact that service order No. 37, which the Bill seeks to cancel, was made upon the petition of the M. & St. L., and that the M. & St. L. had its residence in the Southern District of Iowa. The United States, therefore, challenged the jurisdiction of the District Court for the Southern District of Illinois, contending that under the venue provision of the Urgent Deficiency Appropriations Act (38 Stat. L. 219), the suit could be brought only in the Southern District of Iowa. As exhibits to this answer, the United States attached copy of a Complaint and Application, so called (R. 52) filed with the Interstate Commerce Commission by the M. & St. L., and also exhibits showing that the M. & St. L. is a corporation having its legal residence in the Southern District of Iowa. The Interstate Commerce Commission filed its answer (R. 74 et seq.) replying specifically to each of the paragraphs of the Bill, making certain admissions and certain denials not necessary to set out at large. The M. & St. L. having intervened, filed an answer (R. 83,

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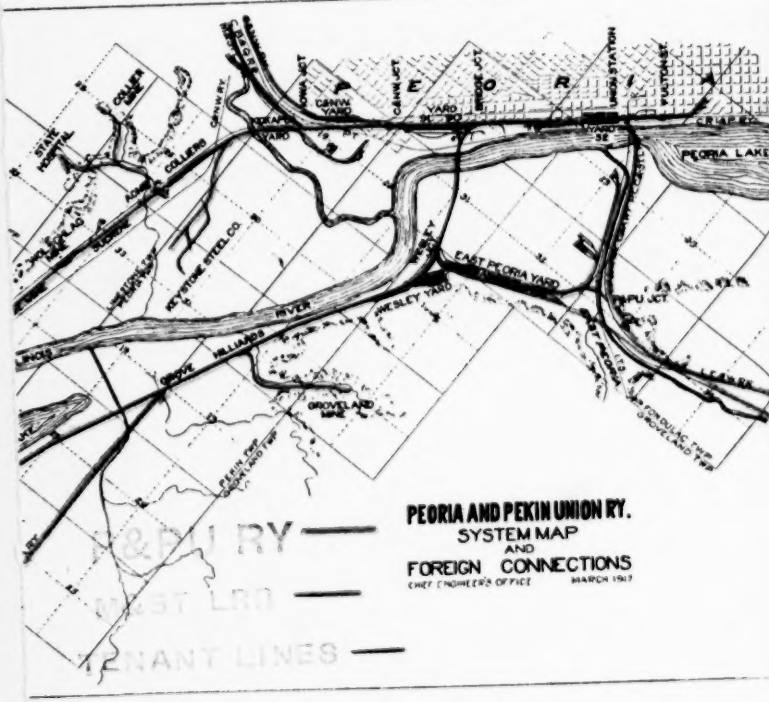

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under the terms of Tariff 66, which was in effect at the time service order 37 was issued by the Commission.

et seq.), in which it was insisted among other things that the service order of the Commission under consideration, was in effect an adjudication by the Commission, that the appellant was merely the agent of its tenant lines at Peoria, and was therefore, not entitled to make any charge for the transfer service rendered by it. The cause having been submitted to the Court upon appellant's motion for a temporary injunction, the Court denied this motion. The opinion of the Court appears in the record at page 94, et seq. The Court, however, overruled the contention made by the Government that it was without jurisdiction, by reason of the venue provision referred to, but held that the order of the Interstate Commerce Commission was within the power of that body, and that the motion for injunction should be denied upon the merits. From this decision, the present appeal is prosecuted. A map or plat, showing the lay-out in the vicinity of Peoria appears opposite this page. On this map the facilities of the M. & St. L. are indicated by one color, the facilities of appellant by another, and the facilities of tenant lines by a third. The point of interchange adopted by appellant, namely, the East Peoria Yard, is conspicuously shown. The service for which appellant demanded compensation consists in taking cars from the facilities of the M. & St. L., and transporting these cars, whether loaded or empty, to the East Peoria Yard, a distance of approximately three miles, where delivery is made to other lines operating in the Peoria territory. This service is covered by a $4 charge under the terms of Tariff 36, which was in effect at the time service order 37 was issued by the Commission.

II. ARGUMENT.

A. The Venue Question.

As shown in the preceding statement of the case, it was contended by the appellees that the United States District Court for the Southern District of Illinois was without jurisdiction to try the issue submitted, it being contended that the only court where the issue could be tried is the United States District Court for the Southern District of Iowa, where the M. & St. L. R. R. Co. has its legal residence (R. 51). It was insisted that the service order which the Bill attacks is an order of the Interstate Commerce Commission made upon the petition of the M. & St. L. The contrary contention urged by appellant and adopted by the Court below is that the order of the Commission was not made upon the petition of the M. & St. L., within the meaning of the Statute, but that it is an order made by the Commission upon its own motion in a proceeding instituted by the Commission, and that the venue therefore properly exists in the district where the matter complained of arises, or, in the district where the petitioner in court has its principal office. In view of the fact that the matter complained of arises in Peoria, and the further fact that appellant has its principal office in Peoria, the contention of appellant is that the southern district of Illinois, in which Peoria is situated, is the proper district in which to bring a suit of this kind.

1. Effect of Failure to Appeal.

No one of the defendants, the United States, the Interstate Commerce Commission, nor the M. & St. L., has prosecuted an appeal in this case, or has assigned

errors attacking the decision of the Court upon this venue question. Since the District Court held that it had jurisdiction, and that the suit was properly brought in that Court, and since none of the defendants has prosecuted an appeal or assigned errors, it would seem that appellees are precluded from urging in this Court any error of the lower court with respect to this question of venue.

The rule on the subject is thus laid down by Mr. Justice Holmes:

> "According to the rule that has been laid down in this Court, Gabriella, as she did not appeal, cannot go beyond supporting the decree and opposing every assignment of error. Mt. Pleasant vs. Beckwith, 100 U. S. 514, 527; The Stephen Morgan, 94 U. S. 599; Chittenden vs. Brewster, 2 Wall. 191, 196; Field vs. Barber Asphalt Paving Co., 194 U. S. 618, 621.
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> *Landram vs. Jordan*, 203 U. S., 56, 62.

In *Field vs. Barber Asphalt Paving Co., supra,* it was said by Mr. Justice Day at page 621 of the opinion:

> "If therefore, the whole case can come to this Court by direct appeal under the allegations of this Bill, and if all the questions, Federal or otherwise, may come up on such appeal, it must follow that either party aggrieved by the decision may appeal, and in this case the complainant appealing, cross appeal may be sued out by the defendant as to the matters decided in the same case against him. If he fails to take such appeal, the correctness of the decision as against him will be presumed. Mail Co. vs. Flanders, 12 Wall. 130; Chittenden vs. Brewster, 2 Wall. 191, 196."

A case which seems to be directly in point is:

Southern Pine Co. vs. Ward, 208 U. S., 126.

In that case Ward prevailed in his suit in a court of first instance in the territory of Oklahoma. His defeated adversary appealed to the Supreme Court of the territory. In that Court, Ward moved to dismiss his adversary's appeal for certain reasons. The territorial Supreme Court overruled Ward's motion to dismiss, but affirmed the case in his favor on the merits. Ward did not prosecute an appeal to the Supreme Court of the United States, but urged in this Court, among other things, that the territorial Supreme Court should have dismissed his adversary's appeal. This court, speaking through Mr. Justice White, said, page 137 of the opinion:

> "The remaining grounds, viz., the failure of the Court below to dismiss and the inadequacy of the assignments of error involve no question concerning our jurisdiction. In order, however, to at once dispose of the first contention, we observe that the appellees cannot be heard to assail the judgment below, since they did not appeal. Field vs. Barber Asphalt Paving Co., 194 U. S. 618, 621, and cases cited."

This authority seems to be precisely in point. Ward challenged the jurisdiction of the territorial Supreme Court, and losing upon this issue, did not appeal from this phase of the decision. By this Court's decision, he was not permitted to urge this action of the lower court as ground of error. In the instant case, appellees urged the lack of jurisdiction in the District Court, and losing upon this point, did not appeal. According to the authorities cited, the question cannot be argued by appellees in this Court.

2. Merits of the Venue Contention.

If mistaken, however, in this contention, and if the Court should conclude that its jurisdiction depends upon the jurisdiction of the District Court, and this question of jurisdiction is always open, we think it is manifest that the court below correctly decided the jurisdictional point. The Statute on the subject reads as follows:

> "The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission, shall be in the judicial district wherein is the residence of the party, or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation, or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office." (38 Stat. L. 219.)

It must be admitted that the statute is not a model of clearness. However, apparently three classes of cases are provided for. In the first place, provision is made for attacking orders of the Commission made upon the petition of a party. Suits of this character must be brought in the district wherein is the residence of the party upon whose petition the order is made. The second clause relates to orders not made upon the petition of any party, but relating to a matter in which

the Commission has received a petition of some sort. Cases to attack an order of this kind must be in the district where the matter complained of arises. The third class relates to cases where the Commission has received no petition of any kind, and in this class the case in court must be brought where the plaintiff in court has its principal office. In the case at bar, it is shown that during the progress of the controversy, the M. & St. L. filed an *ex parte* petition of some sort with the Commission, asking for some relief not very clearly defined. This petition appears at page 52 of the Record. It was filed January 6, 1923. When we examine service order 37 (R. 13), it will be seen, as stated by the court below (R. 100), that the controversy to which the order relates had been in progress for some time before this *ex parte petition* was filed, and that numerous orders had been entered by the Commission with respect to the situation prior to the filing of this petition or complaint. It is recited in the service order (R. 13) "the subject of routing freight traffic being under consideration." The order therefore related to the subject of routing freight traffic. It is said in the first paragraph of the order that the controversy was first called to the attention of the Commission by the complaint filed by the M. & St. L. in Docket 13110, which was a formal complaint. It is shown in the second paragraph of the service order that on January 8, 1923, the Commission by its order 14534 had entered upon a general investigation into and concerning the lawfulness of rates, regulations, and practices of the Peoria and Pekin Union Railway Co., and other railroads. It is recited that the petition of the M. & St. L. (this being the petition appearing on page 52 of the Record), brought to the

attention of the Commission the fact that appellant had indicated its purpose of refusing to interchange traffic. It is recited (R. 14) that appellant had given to the Commission and to the M. & St. L. notice that it would discontinue interchanging traffic, unless arrangement was made for payment. There is a further recital that the order is necessary to promote the service in the interest of the public and the commerce of the people, and in order that the flow of commerce may not be interfered with. In view of these recitals, and the history of the matter, as shown in the Record and condensed in the preceding statement of facts, it is clear that while the M. & St. L. filed some sort of complaint or petition with the Commission, yet the order was not entered upon the petition of the M. & St. L. in the sense in which that expression is used in the first clause of the venue statute, which we have quoted above. Looking at the statute in its entirety, it would seem that this first clause relates to orders of the Commission made as a result of a formal complaint under Section 13 of the Interstate Commerce Act. That Section provides for the filing of complaints, for service of notice upon the carrier against which the complaint is lodged, for answer by the carrier and for a hearing in a formal way before the Commission. In the instant case, as the Bill alleges, and as the Record shows, appellant had no notice whatever of the filing of this alleged complaint, no hearing was had upon the complaint, appellant was given no opportunity to make representations to the Commission with respect to the allegations of the petition, and the order was evidently made by the Commission in the exercise of its emergency powers without any hearing whatever, and without appellant being given

any opportunity to express its views to the Commission. Assuming that each of the three clauses to which we have referred relates to a distinct and separate situation, it is fairly clear that the second clause governs this matter. That clause takes care of a situation where a petition of some sort is filed with the Commission by reason of which the Commission is informed of a certain situation and makes an order relating thereto, without the party affected being made a defendant in a formal fashion. In this class of case, the order is not considered as having been made upon the petition of a party, although a petition or complaint or information has been filed with the Commission, from which it learns certain facts. Or, as said by this Court in

Skinner & Eddy Corporation vs. United States, 249 U. S. 557, 563:

> "The applications of these parties, filed in March, 1916, were doubtless instrumental in securing a reopening of the proceedings which resulted in the order complained of. But the proceedings in which the order was made were the original applications of carriers for relief under the Fourth Section."

In that case the same contention was made by the defendants as its made here, it being alleged that a certain petition filed by shippers residing in Washington and Nevada caused the issuance of the order, which could not be attacked in a district court of Oregon. So, in this case, while the complaint or petition filed by the M. & St. L., may have served to bring the matter more emphatically to the attention of the Commission, yet the order was made by the Commission upon its

own motion under its emergency power, or in any event, as a part of a proceeding which had extended over a considerable time and which involved, not only the complaint of the M. & St. L., in formal Docket 13110, but also the validity and power of a particular Tariff No. 40, filed by the appellant, appellant being a resident citizen of the Southern District of Illinois. For the Court will observe that while the first decision of the Commission (R. 33) is in a formal case brought by the M. & St. L., yet the second decision of the Commission (R. 40), is in an Investigation and Suspension case, dealing with intermediate switching charges at Peoria, and was brought about by the filing of tariffs by the appellant, a resident of the Southern District of Illinois.

Aside from the considerations we have mentioned, it will be noted that the order in this case is made under the so-called emergency powers of the Commission, granted to that body by Paragraph 15 of Section 1 of the Interstate Commerce Act (41 Stat. L. 476). The only power there conferred upon the Commission to make an order of this kind grows out of an emergency due to the shortage of equipment, congestion of traffic, or some matter of this character. The Commission is given power to make such an order, either upon complaint, or upon its own initiative without complaint. No answer or formal pleading is necessary, and the order may be made with or without notice. In this case the order was made without notice, and without hearing. The recital in the order is that it is in the public interest, that it is a public matter, and that it was necessary in order to prevent the interruption of commerce. Such an order cannot be said to be one that is made upon the petition of

any party. The interest of any particular party is secondary to the interest of the public. This feature of the matter is referred to in the opinion of the Court in this case, and it is correctly said that it may well be doubted if an emergency service order of this kind can ever be made upon the petition of a party, in the sense in which that term is used in the venue provision of the statute (R. 100). We contend, therefore, that the venue was properly laid in the Southern District of Illinois. Any other construction of the law would subject a litigant in the position in which appellant finds itself to unreasonable hardships. If this suit had been brought in the Southern District of Iowa, undoubtedly appellant would have been confronted with the contention that the order had not been made upon the complaint of the M. & St. L., and that the suit should have been brought where the matter arose, or where the appellant had its principal office, namely, in the Southern District of Illinois. Appellant had no notice of the filing of any complaint. At the time it found it necessary to bring this suit in court, it had not seen a copy of the complaint, as the Bill shows. It could not be certain that this informal, *ex parte* petition was of such a nature as to be the basis of the order in a legal sense. The order of the Commission does not recite that it is made upon the complaint of the M. & St. L. It merely recites that by reason of the petition of the M. & St. L., certain facts were brought to the attention of the Commission. Of course, the Commission must get its information from some source. The written petition or complaint of the M. & St. L. was no more effective to set in motion the Commission's machinery than would have been a verbal message delivered by the M. & St. L. to the

Commission. From the recitals in the Commission's order here under attack, it would appear that this order was made as much by reason of the information which the Commission had received from the appellant as from the information received from the M. & St. L. The order recites that certain information was received through the petition of the M. & St. L., and certain other information received by a notice given by appellant. Acting upon this information, and in the public interest, the Commission makes its order. We submit that the venue was laid properly in the district where the appellant had its principal operating office, and where the matter complained of arose.

B. Invalidity of Service Order 37.

1. No Power to Require Switching.

Coming now to the merits of the case, it is our contention that the Commission in promulgating Service Order 37 exceeded its power under the statute, in that it required appellant to perform a service in the matter of interchanging freight, deriving its assumed authority to make the order from the provisions of the Car Service Statute, which statute does not give to the Commission the right to make an order of this character. We contend, therefore, that since the Commission is an administrative body, exercising only such powers as are conferred upon it by Congress, this order, being in excess of such statutory power, is void and therefore not binding upon the carrier. If this contention is correct, appellant has a right to have the order adjudged void by the courts, and therefore enjoined and set aside.

It will be noted (R. 14) that the mandatory portion of the order reads as follows:

"That the Peoria and Pekin Union Railway Co. shall with reasonable promptness and diligence continue to interchange freight traffic between the Minneapolis and St. Louis Railroad Co. and connecting carriers, at the regularly established interchange points at and in the vicinity of Peoria, Ill."

It is necessary that we examine the entire order, and to some extent, at least, the orders of the Interstate Commerce Commission made previously, dealing with the general situation, in order to apprehend precisely what is required of appellant by the terms of this order. Service Order 37 recites in the preamble that a controversy exists between the M. & St. L. and appellant with regard to the terms under which appellant shall interchange freight traffic between the M. & St. L. and connecting carriers at Peoria. Reference is made to the formal complaint filed by the M. & St. L. under the Docket No. 13110. When we refer to the opinion and order of the Commission entered in this case (R. 33), we find a history of the controversy, and there learn that the question before the Commission was as to whether the appellant had a right to impose by tariff a charge of $4 per car for switching cars from and to the terminal of the M. & St. L., to and from the terminals of other lines. The service for which the charge was proposed was a switching service which contemplated that appellant should with its engine and crews switch cars over its, appellant's tracks, from and to points of interchange. This switching service included the use of tracks, engines, crews, coal, and everything necessary to operate a switch engine and perform a complete switching service. Referring again to Service Order 37 (R. 13), it appears

that under the Docket No. 14534, the Commission had entered upon a general investigation into the practices of appellant and other railroads with respect to this matter of switching. It further appears that the appellant had indicated to the M. & St. L., that unless appellant received pay for its switching service, it would decline to perform such service between the M. & St. L. and its connections. The service order contains a further recital (R. 13) that the M. & St. L. is not paying for such switching service, and is unwilling to pay for that service pending the determination of the controversy being adjudicated by the Commission. The order recites further that this refusal of appellant to perform this switching service, and the refusal of the M. & St. L. to pay any of the charges for this service, creates an emergency which requires immediate action by the Commission. The order recites (R. 14) that in order to promote the service in the interest of the public and the commerce of the people, and to prevent interference with the constant flow of interstate commerce, appellant is directed to continue to interchange freight as it had formerly done. It is therefore obvious that by the term "interchange freight" is meant the performance of switching service by the appellant.

We are not left in doubt as to the particular statute under which the Commission assumed to make this emergency order. In the answer of the Interstate Commerce Commission (R. 76), it is stated:

> "The Commission further alleges that its Service Order No. 37 was made and served upon plaintiff in accordance with the authority conferred and the duties imposed upon the Commission by Paragraph 15 of Section 1 of the Interstate Com-

merce Act, which is an emergency paragraph and authorizes the making and service of such orders without holding of formal hearings."

Again it is said in the 13th paragraph of this answer (R. 77):

> "Answering Paragraph 19 of the bill of complaint, the Commission denies that said service order No. 37 is illegal. On the contrary the Commission alleges that said order was made and served upon plaintiff in accordance with the authority conferred upon the Commission by the Interstate Commerce Act, including paragraph (15) of Section 1 of said act, and for the purpose of performing a duty imposed upon the Commission by that act."

In the order it is stated that it is made "best to promote the service in the interest of the public and the commerce of the people" (R. 14). This admission by the Commission in its answer and this recital in the order show clearly that the Commission finds its authority, if at all, in Paragraph 15, Section 1 of the Interstate Commerce Act (41 Stat. L. 476). Furthermore, it would appear that the order rests, very largely at least, upon Subsection (b) of this Paragraph 15. Indeed, it is not contended, nor will it be contended by appellees that there are any other provisions of the law which give to the Commission authority to make an order similar to this without a hearing and without notice to the interested parties. In order to determine, therefore, whether the order is in excess of the Commission's power, and thereby to test its validity, it is necessary to examine this Paragraph 15. To some extent, it may be necessary to consider Para-

graphs 10-17, inclusive, of Section 1 of the Interstate Commerce Act, these being the Sections which are commonly referred to as the "Car Service Act."

Directing our attention particularly to Paragraph 15, it will be found that the law provides that whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have power to do certain things. The first of these is thus stated:

> "To suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission."

It is obvious that this paragraph of the law has no application to the case in hand. The second power thus specifically conferred upon the Commission in emergency is the power

> "To make such just and reasonable directions with respect to car service, without regard to the ownership as between carriers of locomotives, cars and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable."

In view of the recitals in the Commission's service order here under attack, it is more than probable that the Commission found its alleged authority to make the order in question in this language of the statute.

It will be observed that the Commission has power to make just and reasonable directions with respect to car service. It is necessary to ascertain just what is meant by the term "car service" as that expression is used in the Act. If we turn back to Paragraph 10 we find this language:

> "The term 'car service' in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains by any carrier by railroad, subject to this Act."

It will be seen that the term "car service" has to do only with vehicles of transportation. Paragraph (b) under which authority here is sought, gives power to the Commission to determine the use, control, supply, movement, etc., of these vehicles of transportation. Obviously the reference is to cars, locomotives, and other vehicles. No power is here attempted to be conferred upon the Commission to require one railroad to perform a service for another. It is obviously the thought in the mind of the statute makers that times may come when it is necessary for one railroad which is suffering from a shortage of equipment, whether that equipment be cars or locomotives, to be allowed to use the cars and locomotives of another carrier, which may be well supplied with these vehicles. It was obviously not the purpose of Congress to require one carrier actually to perform a switching or other service for another carrier. Congress did not intend that the employees of one carrier should be forced into the service of another. To say that because the Com-

mission has power to allow a railroad to use or control vehicles of another, it may require one railroad to perform switching for another, is to extend the language far beyond its plain and natural meaning. If we take the term "car service" in its ordinary acceptation, as it is understood by railroad men and laymen alike, it would never occur to anyone that by the term "car service" there was meant the performance of actual transportation service by one carrier for another. The thought is perhaps made a little clearer by considering in this connection Subsection (c) of Paragraph 15, which gives to the Commission in time of such emergency the right

> "To require such joint or common use of terminals, including main line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing, find to be just and reasonable."

Considering Paragraphs (b) and (c) together, it is obvious that the Congress meant to give the Commission power to allow one carrier to use instrumentalities of another, whether these instrumentalities be vehicles, tracks or terminal facilities. It is a matter of common knowledge that in certain periods of extraordinary congestion, when traffic conditions were highly abnormal, the traffic of the country suffered because of the inability of certain railroads to handle traffic which was tendered them, due to a shortage of equipment and to the lack of necessary terminal facilities. At the same time, other railroads had perhaps a sur-

plus of such equipment, and ample room in its terminals for the handling of additional traffic. Congress meant to give to the Commission authority to allow one railroad to use the facilities of another in such an emergency, upon terms as to compensation which should be fixed by the Commission provided the parties were not able to agree upon such terms. But it is nowhere suggested in the law that the Commission is given the power to require a railroad to take its employees and its engines and go out and perform an actual switching service for another railroad. It is one thing for the Commission to say to the appellant in this case: "You must allow the M. & St. L. to use your engines," or "You must allow the M. & St. L. to run over your tracks and terminals in order to make delivery." It is quite another thing for the Commission to say to the appellant, as it has: "You must hire employees, pay out your money for their wages, supply your engines with coal and water at your own expense, and take those engines thus manned by your employees and supplied with fuel, and go and perform a switching service for the M. & St. L." The distinction between the power conferred by the Commission by the statute, and the power which the Commission sought to exercise in this case, is perfectly clear. If this power is upheld, it will mean, not merely that one railroad may use the equipment and the facilities of another, but that one railroad may call upon another to perform all the service which the law imposes upon the railroad making the demand. It is one thing for the Commission to say to the Baltimore and Ohio Railroad in the City of Washington that it must allow the Pennsylvania to have a certain number of its engines and cars, or to use its terminal facilities in Washing-

ton, and quite another thing for the Commission to say to the Baltimore and Ohio: "You must take your engines, manned by your crews, and perform a transportation service for the Pennsylvania Railroad." If we imagine that the Pennsylvania Railroad has a train load of traffic in the City of Washington to be transported to Philadelphia, it is one thing for the Commission to require the Baltimore and Ohio to furnish an engine to pull that traffic, and quite another thing for the Commission to require the Baltimore and Ohio Railroad to take that engine with the Baltimore and Ohio employees and actually haul the train to the City of Philadelphia.

In the instant case, the order of the Commission is that the appellant shall continue to perform interchange service. Whether such an order is wise, whether it is provident, whether it is just, whether it is in the public interest, is entirely beside the question. The question is one of statutory authority. It will hardly be contended that the Commission has general powers, such as are exercised by a court of equity, to make any sort of order which in its wisdom it sees proper to make, and which it thinks necessary to prevent interruption of traffic. To give the Commission power to permit one railroad to use the facilities of another is an extraordinary power. We are not arguing here against the constitutionality of the statute, particularly since such argument is unnecessary. We are contending, however, that the court cannot imply powers to the Interstate Commerce Commission beyond those which are expressly and explicitly conferred by the statute, particularly when the powers so exercised stretch almost to the line of unconstitutionality, if indeed they do not extend beyond that line. If the power here admitted to be asserted by the Commission is up-

held, there is no limit to the extent to which one railroad may be required to perform service for another in the matter of transportation. No railroad can be certain that it will be allowed to use exclusively its own employees in the conduct of its business. It may be required to give up its vehicles, but it certainly cannot be required to go farther and employ men to operate those vehicles for another.

2. Service Without Compensation.

We have dealt heretofore solely with the question of power without reference to the question of compensation. It will be noted, however, that the statute confers upon the Commission authority to allow the use of these vehicles, and the use of these terminal facilities, only upon such terms as to compensation as the parties may agree upon, or as the Commission may fix. Under this order no compensation is fixed by the Commission, nor is it provided that the Commission will fix the compensation provided the parties cannot agree. The inference rather is that the service is to be performed without compensation. We think this is a justifiable statement, in view of the fact that the order recites that the M. & St. L. has refused to pay any compensation and vigorously asserts that it is not liable for such compensation. Not a word is said in the Commission's report as to compensation. It is not provided, as the statute requires, that the parties shall either agree upon compensation, or refer the matter to the Commission. It will be observed that the statute makes the order conditioned upon the payment of compensation, but the order is absolute in its terms. It states that the appellant shall continue to interchange freight traffic between the M. & St. L. and connecting carriers. There is no qualification in

the order that this shall be done, provided compensation is paid, nor any provision that compensation will be determined later if the parties cannot agree. It is this phase of the order that leads to the contention in the Bill that the order as promulgated violates the Fifth Amendment to the Constitution of the United States, in that appellant is thereby deprived of his property without due process of law, and that its private property is taken for public use without just compensation. Obviously, the property is private. It is not necessary to cite authorities to convince the Court that the property of a railroad company is essentially private property, although it is dedicated in a sense to the public service. Having, therefore, all the qualities of private property, the Commission seeks by this order to devote this property to a public use without making any provision for compensation. Of course, it cannot be said that this infirmity exists in the statute, since the statute clearly provides for compensation, which compensation is to be fixed by the Commission, provided the parties cannot agree as to the amount. That the property is to be devoted to a public use, rather than to the private use of the M. & St. L., is clear from the recitals of the service order and from the terms of the statute under which this order is made. If the law is to be construed as permitting the Commission to take the private property of appellant and apply it to the private purposes and uses of the M. & St. L., obviously the statute would be unconstitutional. It can be upheld on constitutional grounds, only upon the theory that the use is a public one, and that the public interest demands that the property of the one carrier should be devoted to the purpose of the other. Therefore, since there is no provision in the order for the payment of compensation,

there is a clear violation of the provisions of the fifth amendment and particularly that portion of the amendment which prohibits the taking of private property for public use without compensation.

3. Limitations Upon Commission's Power.

It may be said that the order was necessary to prevent an interruption of traffic, that the public interest demanded that this quarrel between two railroad companies should not be allowed to interrupt the orderly flow of interstate commerce, that somewhere there should be power lodged in some public tribunal or court to keep uninterrupted this flow of commerce. If such be granted for the sake of the argument, it does not add anything to the validity of this order. For, if the appellant, in view of its public or charter obligations, fixed by sanctions of the law or the terms of its tariffs, was in duty bound to continue performing this service; if it be conceded that the courts had authority by means of injunction or mandamus, or otherwise to compel the doing of this service by the appellant, this in no way weakens our contention that this particular service order, issued as it was without specific grant of authority in the statute has no validity. The Commission is not a court. It has no general powers. It is not the general manager of all the railroads of the country. It can do only the things which Congress has authorized it to do.

The argument that public necessity should cause the courts to confer power upon the Commission by implication was earnestly urged upon this court very early in the history of rate regulation. In the beginning of the Commission's history, it undertook to perform many duties without specific authority which were alleged to be in the public interest. Reference may be had to the case of

Interstate Commerce Commission vs. Cincinnati, New Orleans and Texas Pacific Railway Co., 167 U. S. 409.

In this case the court was called upon to pass upon the question of whether the Commission had authority to fix maximum freight rates. The question had been decided previously by the court, but the case to which we refer goes more elaborately and carefully into the question, and presents a fuller discussion than can previously be found of the duty of the Commission and its power under the statute. When it was pointed out that the statute did not expressly confer upon the Commission authority to fix maximum freight rates, the answer was that it was necessary to infer this power in order that the Commission might function as an effective rate-regulating body. It was argued in substance that if the Commission declares a rate unreasonable, it should be allowed the right as a necessary corollary to fix the limit of unreasonableness, or, in other words, to establish a point beyond which the carrier could not go and at the same time observe the canon as to reasonableness. In a most elaborate opinion by Mr. Justice Brewer this view was utterly rejected. The court declined to extend this power by implication, holding, in effect, that before a power could be exercised by the Commission it must clearly be granted. While it is perhaps unnecessary to cite authority upon the proposition that the Commission cannot exceed its statutory power, yet we call attention to the case of

United States vs. Pennsylvania Railroad Co., 242, U. S. 208.

This is sometimes spoken of as the "Tank Car Case." In that case, there was involved the question of the power of the Commission to require the Pennsylvania Railroad to equip itself with a special type of equipment, namely tank cars in which to transport oil and other liquids of that character It was conceded, for the purpose of the argument that the statute required the carriers to furnish equipment, and it was further conceded that by reason of this provision of the statute the Commission had power to require a carrier to supply shippers with ordinary equipment. It was argued that the power to require a carrier to furnish ordinary box cars or ordinary coal cars, carried with it by necessary implication the power to require carriers to supply special types of equipment, such as tank cars. The court, however, in a most careful review of the situation by Mr. Justice McKenna, held that this power would not be inferred or implied, there being no expressed statutory authority giving this power to the Commission. These cases are simply familiar illustrations of the general principle that an administrative body such as the Interstate Commerce Commission must look to the statutes and there find a clear and express authority for any of the powers which it undertakes to exercise.

4. Order Violates Tariff.

There is another consideration which should be mentioned. It is alleged in the Bill, and admitted in the answer of the Interstate Commerce Commission that at the time the service order was issued, there was in effect a Tariff, No. 36, filed by the appellant with the Interstate Commerce Commission, imposing a charge of $4 per car for performing the identical switching service which the Interstate Commerce Commission by its service order required appellant to perform.

Although the Commission had held in its first decision (R. 33) that this charge was discriminatory because not imposed upon the Chicago, Burlington & Quincy and the Chicago, Rock Island and Pacific, it was not condemned as inherently unlawful, and appellant was permitted to remove the discrimination by making a similar reasonable charge against the Rock Island and the Burlington. The history of the controversy shows that the appellant undertook to remove the discrimination by filing its Tariff No. 40, imposing a similar charge upon these other two railroad companies. In its second decision in this case (R. 40), the Commission did not require the cancellation of this charge. So that, whatever infirmities may attend it, it was at the time of the issuance of the service order actually in effect and had never been required to be cancelled by the Commission. This is expressly admitted in the answer of the Interstate Commerce Commission. Thus it is said in that answer (R. 76):

> "Answering Paragraph 14 of the bill of complaint, the Commission admits that it made and entered its service order No. 37, and admits that the Tariff referred to is in effect and on file in the Commission's office, but the Commission denies each of and all of the other allegations contained in said paragraph, etc."

It will be seen, therefore, that the Commission is requiring the appellant to perform this service, although by the terms of the order, it is found as a fact that the M. & St. L. is refusing to pay the tariff charges and is asserting that it is not bound to pay such charges. We have, therefore, the extraordinary instance of the Commission requiring the appellant to violate its own

tariff and to perform a service without collecting therefor the tariff charge which under the law it is bound to collect.

It may be said that the Peoria & Pekin Union Railway should have continued to perform the switching service and sought its remedy by bringing an action at law against the M. & St. L. for the tariff charges. It is well settled, however, that a railroad company is not required to extend credit to a shipper. No one doubts the law to be that it is the right of a carrier to demand the prepayment of its charges. Particularly is this true where the shipper refuses to make payment and asserts his determination not to pay the tariff charges which are in effect. The same rule must perforce apply to the relations between one railroad company and another. It is the common practice of carriers where a railroad company is approaching insolvency or is in default of its settlements to insist upon what is commonly known as junction point settlements. That is to say, a solvent railroad dealing with an insolvent carrier or with a recalcitrant carrier with respect to charges may refuse to handle the freight from the junction point unless the charges are prepaid. While there is no suggestion in this record that the M. & St. L. is insolvent, yet the record and the service order show that it had notified the appellant that these charges would not be paid, and that it would insist upon the service being performed by the appellant without compensation.

That one carrier may refuse to handle traffic for another unless there is prepayment of the charges is stated without qualification by this Court in

Wadley Southern Railway Company vs. Georgia, 235 U. S. 651.

In this case there was involved the question of whether, as a matter of right under the Fourteenth Amendment, a railroad company could be penalized by a State Commission, acting under a State Law, for refusing to accept freight from one connection without prepayment of the freight charges while at the same time accepting freight from another connecting carrier without requiring prepayment. Of course, no such question is involved here, but in passing upon this question, Mr. Justice Lamar stated the general rule to be that a carrier may decline to receive freight from a shipper except upon prepayment of charges and that the same is true as between connecting railroads. In the case cited it was necessary for the Court to give some further consideration to the question of whether a State Commission had authority to rule that a railroad must treat all connections alike. That question is not here, but if it were, according to the weight of Federal authority, a railroad may demand prepayment of one carrier and waive this requirement as to another. See,

Gulf, Colorado, etc. Railway Company vs. Miami Steamship Company, 86 Fed. Rep. 407.

Authorities to the contrary are from the State Courts.

III. CONCLUSION.

If it should be contended that the Service Order in this case rests in any way upon the authority conferred upon the Commission in Section 3 of the Interstate Commerce Act (41 Stat. L. 479), and particularly Paragraph 4 thereof, which deals to some extent with the use of terminal facilities, the answer is that this

section does not confer any authority upon the Commission to make an emergency order upon the ex parte petition of an interested party and without notice to the other interested party or opportunity for being heard. But even if this section is considered applicable, it is certainly no broader as to the subject matter than the provisions of Paragraph 15 of Section 1. Nowhere does this Paragraph 4 of Section 3 assume to confer any authority upon the Commission to require the performance of switching service.

It may be said that Paragraph 3 of Section 3 has some bearing upon this case. That section makes it obligatory upon carriers to exchange traffic and to receive, forward, and deliver traffic received from connections. It is further provided in this paragraph that this interchange shall be without discrimination, but the Commission is given no power to enforce this section of the law in a summary manner by any emergency order issued without notice, or opportunity for the interested parties to be heard. Clearly, the only section of the law which is here involved is Paragraph 15 of Section 1.

For these reasons, we respectfully submit that the decree of the court below should be reversed and that appellant's prayer for a temporary injunction should be granted.

Respectfully submitted,

JOHN M. ELLIOTT,
ROBERT V. FLETCHER,
Attorneys for Appellant.